Filed 3/20/12 P. v. Crawford CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARVIN CRAWFORD, Defendant and Appellant.	H036559 (Monterey County Super. Ct. No. SS101996)

In this case we are asked to decide if the trial court deprived appellant Marvin Crawford of his right to due process of law under the Fourteenth Amendment when it deemed his defense—that intermittent short-term memory loss from an earlier stroke negated his willful failure to register as a sex offender—meritless as a matter of law. Further, we are asked to decide if a probation condition requiring appellant to not associate with any individuals he knows or has reason to know to be a drug user, or on any form of probation or parole supervision, is void for vagueness.

For reasons that follow, we affirm the judgment.

Facts and Proceedings Below

On October 29, 2010, appellant was charged by amended information with felony failure to update sex offender registration. (Pen. Code, § 290.012, subd.(a).) The

information contained an allegation that prior to the commission of this offense appellant had suffered a conviction for rape in case number SS990810A.

On November 5, 2010, appellant waived his right to a jury trial and requested a court trial on the understanding that the court would impose no more than two years in state prison if the court found him guilty, but probation "would be left open" and the prosecutor would move to strike the strike allegation in the amended information. The court inquired of defense counsel, "Is this in the nature of a slow plea?" Defense counsel told the court, "Not necessarily. There's a defense, your Honor."

On November 23, 2010, the parties appeared for the court trial. However, defense counsel and the prosecutor reached an agreement on the facts necessary for the court to decide the case. Specifically, defense counsel and the prosecutor stipulated that appellant was required to register on June 9th, 2010, or five days thereafter; that appellant called and left a message on June 11th to make an appointment to register; that he was called back on June 11th and left a message to come in on the 15th to register; that he did not appear on June 15th to register; that in June of 2008 appellant had suffered a stroke; and that if appellant should testify he would claim short-term memory issues as a result of the stroke.

The prosecutor told the court that the People would claim that a review of the appellant's medical records did not show specific memory loss. The prosecutor reminded the court that it "was going to give an indicated [sic] as to its position on the claim of medical memory loss."

Defense counsel reiterated that if called to testify appellant would claim that he suffered short-term memory loss issues and that is what led to his failure to register on time this year. The court stated that it was the court's "intent, based on those facts and those stipulations" to find appellant guilty. Thereafter, the court decided to take a waiver of a court trial because "this is really a slow plea now that we've gotten to this point."

After the court took appellant's waiver of his right to a court trial, the court found "*that if there is a memory loss that is intermittent and caused because of a medical issue, that is not an excuse that would excuse failing to register.* So that's the finding of the Court as far as what the law is concerned. And based on the Court's understanding of the law and the stipped facts, the Court does find the defendant guilty." (Italics added.)

Subsequently, on January 6, 2011, the court suspended imposition of sentence and admitted appellant to probation on various terms and conditions including that he is not to associate with any individuals he knows or has "reason to know" to be drug users.

Discussion

Due Process

Appellant contends that the court applied the wrong legal standard in discussing his defense to the charge of failure to register and thus reversal of his conviction is required.

In order to establish a failure to register, the prosecutor must show the failure was willful. (Pen. Code, § 290.018.) In *People v. Garcia* (2001) 25 Cal.4th 744, the California Supreme Court held that the willfulness element of the statute requires actual knowledge of the duty to register and that "[a] jury may infer knowledge from notice, but notice alone does not necessarily satisfy the willfulness requirement." (*Id*. at p. 752.)

Subsequently, in *People v. Sorden* (2005) 36 Cal.4th 65 (*Sorden*), the California Supreme Court held "that the willfulness element of the offense may be negated by evidence that an involuntary condition-physical or mental, temporary or permanent-deprived a defendant of actual knowledge of his or her duty to register." (*Id*. at p. 69.)

Appellant contends that *Sorden* makes no distinction with regard to intermittent disability and in fact allows evidence of " 'temporary' " conditions as long as they are involuntary. Thus, he argues he sought to present evidence of a medical condition that led to memory loss, which would tend to negate the willfulness element of Penal Code

section 290, but the court dismissed his defense outright depriving him of due process of law.

In *Sorden*, the defendant made an offer of proof that his friends would testify that "he was depressed because (1) his mother had cancer; (2) the mother of his son, in order to terminate his visitation rights, had falsely accused him of being abusive to the boy; (3) he had broken up with his girlfriend; and (4) his dog had died." (*Sorden, supra*, 36 Cal.4th at p. 70.) "[D]efense counsel said the testimony of defendant's friends, as to 'what he was going through at the time,' would lay the foundation for an expert witness who would testify (1) that defendant was 'showing signs of clinical depression,' and (2) how depression affects 'concentration and memory.' " (*Ibid.*) The trial court ruled in limine that the evidence was not admissible. (*Ibid*.)

The California Supreme Court recognized that "a person may suffer from an involuntary condition so disabling as to rob him of knowledge of his registration obligations under section 290. Therefore, in order to avoid any due process problems . . . a defendant charged with [a] violation of section 290 may present substantial evidence that, because of an involuntary condition -- temporary or permanent, physical or mental -- he [or she] lacked actual knowledge of his [or her] duty to register." (*Sorden, supra*, 36 Cal.4th at p. 72.) The court concluded that the defendant had not proffered such evidence. The court reasoned, "There is no question but that he knew of his duty to register. He simply claimed his depression made it more difficult for him to remember to register. However, life is difficult for everyone. As a society, we have become increasingly aware of how many of our fellow citizens must cope with significant physical and mental disabilities. But cope they do, as best they can, for cope they must. So, too, must defendant and other sex offenders learn to cope by taking the necessary measures to remind themselves to discharge their legally mandated registration requirements. It is simply not enough for a defendant to assert a selective impairment that conveniently affects his memory as to registering, but otherwise leaves him largely

functional." (*Ibid.*) The court also stated that the "question whether a defendant has proffered evidence sufficiently substantial to go to the jury under the standard [it announced] is a question confided to the sound discretion of the trial court." (*Id.* at p. 73.)

The defendant in *Sorden* proffered both lay and expert evidence that supported his defense that his depression affected his ability to remember his duty to register. The Supreme Court concluded that the evidence offered did not rise to the level required to negate the element of willfulness and that the trial court did not abuse its discretion when it refused to admit evidence related to the defendant's depression. (*Sorden, supra,* 36 Cal.4th at pp. 71-74.) The court emphasized that "[o]nly the most disabling of conditions," such as "[s]evere Alzheimer's disease" or "general amnesia induced by severe trauma" would qualify under the standard it announced. (*Id.* at p. 69.)

Contrary to respondent's suggestion, it does appear that the trial court held as a matter of law that appellant's intermittent short-term memory loss was not a defense to a failure to register. For reasons that follow we hold that determination was correct.

There is no question that appellant knew of his duty to register. He so admitted by stipulating that he called the Sheriff's department on June 11, 2010, to make an appointment to register. This evidence, plus the evidence of his failure to keep his appointment four days later, shows that his memory loss was intermittent. An intermittent short-term memory loss, even if caused by a stroke, is akin to forgetfulness and mere forgetfulness does not excuse compliance with the statutory requirements. (*People v. Barker* (2004) 34 Cal.4th 345, 348, 358-359.) As *Sorden* specified, to excuse the failure to register, the defendant's mental condition must "nullify[ ] knowledge of one's registration obligations." (*Sorden, supra*, at p. 73.) Whatever is the extent of appellant's intermittent short-term memory loss, the evidence shows that at times he is completely functional. Thus, appellant sought to introduce evidence of his intermittent short-term memory loss solely to establish that after he called to register he forgot to keep

his appointment. Whatever the precise nature of appellant's impairment, it does not meet the strict standard of "the most disabling of conditions." (*Id.* at p. 69.) We reiterate, "[i]t is simply not enough for a defendant to assert a selective impairment that conveniently affects his memory as to registering, but otherwise leaves him largely functional." (*Id.* at p. 72.) As in *Sorden,* appellant "knew of his obligation to register and, had he taken it to heart, he could have managed to discharge it." (*Id.* at p. 69.)

Under *Sorden,* appellant is required to cope with his intermittent short-term memory loss by taking the necessary measures to remind himself to discharge his legally mandated registration requirement. (*Sorden, supra,* at p. 72.) We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Accordingly, under the facts of this case, we conclude that the trial court did not err in finding that appellant's defense to a failure to register was meritless as a matter of law.

Probation Condition

Appellant challenges the probation condition imposed by the court requiring him to "Not associate with any individuals you know or have reason to know to be drug users, or on parole or probation." Relying on this court's opinion in *People v. Gabriel* (2010) 189 Cal.App.4th 1070, appellant contends that the "have reason to know" language fails to provide him with adequate notice that a person is a drug user or on probation or parole. Further, the inclusion of the "have reason to know" language is insufficiently precise for a court to determine whether a violation has occurred and as such is impermissibly vague.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions. [Citations.]' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*).) "The vagueness doctrine ' "bars enforcement of 'a statute which

either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " [Citations.]' " (*Ibid.*)

Certainly, the probation condition at issue here does contain an express knowledge requirement. The question is whether the phrase "have reason to know" is akin to the word "suspect" that this court found wanting in *People v. Gabriel, supra,* 189 Cal.App.4th 1070 (*Gabriel*).

In *Gabriel*, this court held that the word "suspect" in a probation condition lacked sufficient specificity and thus failed to provide the defendant with adequate notice of what was expected of him when he lacked actual knowledge. (*Id.* at p. 1073.) Specifically, this court pointed out, "To 'suspect' is 'to imagine (one) to be guilty or culpable on slight evidence or without proof' or 'to imagine to exist or be true, likely, or probable.' (Merriam–Webster's Collegiate Dict. (10th ed.1999) p. 1187 (*Webster's*).) To 'imagine' is 'to form a notion of without sufficient basis.' (*Webster's,* at p. 578.)" (*Ibid.*) Thus, we concluded, "Given this lack of specificity, the word 'suspect' fails to provide defendant with adequate notice of what is expected of him when he lacks actual knowledge that a person is a gang member, drug user, or on probation or parole. Moreover, inclusion of this word renders the condition insufficiently precise for a court to determine whether a violation has occurred." (*Ibid.*) To have a "suspicion" is "[t]he act of suspecting something . . . on little evidence or without proof." (American Heritage Dict. (3d College ed.1997) p. 1368.) In contrast, "have reason to know" requires an objective standard—something with a minimal level of objective justification.

In the context of penal statutes, the California Supreme Court has determined that culpability based on the "reasonably should know" constructive knowledge standard is not vague. Specifically, in *In re Jorge M.* (2000) 23 Cal.4th 866, the California Supreme Court determined that proving a violation of the Assault Weapons Control Act required showing "that a defendant charged with possessing an unregistered assault weapon *knew*

or reasonably should have known the characteristics of the weapon bringing it within the registration requirements of the AWCA." (*Id.* at pp. 869–870.) The court rejected a suggestion that such an interpretation was unconstitutional. The court explained, "That a criminal statute contains one or more ambiguities requiring interpretation does not make the statute unconstitutionally vague on its face [citation], nor does it imply the statute cannot, in general, be fairly applied without proving knowledge of its terms." (*Id.* at p. 886; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 779–782 (*Rodriguez*) [holding constitutional the special circumstance of peace officer murder under section 190.2, subdivision (a)(7), which applies to a defendant who has intentionally killed another who the defendant "reasonably should have known" was a peace officer engaged in the performance of official duty]; accord, *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691; *People v. Mathews* (1994) 25 Cal.App.4th 89, 97–98 [holding constitutional former section 417, subdivision (b), which prohibited a defendant from exhibiting a firearm in the presence of another when the defendant "reasonably should know" the person is a peace officer engaged in the performance of official duty]; *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436 [ordering probation condition modified to state that the defendant is precluded from associating with people he " 'knows or reasonably should know' " are under 18 years old].)

In this case, the probation condition at issue prohibits appellant from associating with anyone he knows or has "reason to know" is of a certain status. We do not believe that the phrase "reason to know" sets forth a different or a less precise standard than the phrase "reasonably should know." Regarding the latter phrase, the word "reasonably" means "in a reasonable manner," and "reasonable" means "not conflicting with reason" and "being or remaining within the bounds of reason." (Webster's 3d New Internat. Dict. (1993) p. 1892.) The word "should" has the function of "express[ing] . . . obligation." In the probation condition at issue, either the phrase "reason to know" or the phrase

"reasonably should know" would require appellant to stay away from those individuals who he has an objectively rational ground to know is of a certain status. We do not believe the two phrases create significantly different standards in this context. (See *People v. Morris* (2010) 185 Cal.App.4th 1147, 1155 [using "reason to know" phrase in reference to a sentence enhancement under section 667.9, which applies to a defendant who commits an enumerated offense against a victim who has a specified disability or condition that "is known or reasonably should be known" to the defendant].)

Finally, we understand appellant to be arguing that *Sheena K., supra,* 40 Cal.4th 875, requires an "actual knowledge requirement" and that we must therefore strike the "reason to know" language. In *Sheena K.,* the California Supreme Court concluded that a probation condition prohibiting the defendant from associating with " 'anyone disapproved of by probation' " was unconstitutionally vague. (*Sheena K., supra,* 40 Cal.4th at p. 889.) The court determined that "modification to impose an explicit knowledge requirement is necessary to render the condition constitutional. [Citations.]" (*Id.* at p. 892.) The court reasoned that, without "an express requirement of knowledge," "the probation condition did not notify defendant in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer." (*Id.* at pp. 891–892, fn. omitted.) The court suggested that "form probation orders be modified so that such a restriction explicitly directs the probationer not to associate with anyone 'known to be disapproved of' by a probation officer or other person having authority over the minor." (*Id.* at p. 892.)

Despite sweeping language in *Sheena K.* requiring an "express" or "explicit" knowledge requirement (*Sheena K., supra,* 40 Cal.4th at pp. 891, 892), we are not persuaded that *Sheena K.* stands for the proposition that "actual knowledge" is required regarding the conduct that is prohibited. In *Sheena K.,* the California Supreme Court expressed approval of the appellate court's insertion in the probation condition of "the qualification that defendant have knowledge of who was disapproved of by her probation

officer." (*Id.* at p. 892.) The California Supreme Court did not address whether a "reason to know" standard might also satisfy constitutional concerns. "Cases are not authority for propositions they do not consider. [Citation.]" (*People v. Martinez* (2000) 22 Cal.4th 106, 118.) In this case, the probation condition at issue contains an explicit knowledge requirement. Appellant is prohibited from associating with anyone who he "know[s]" (actual knowledge) or has "reason to know" (constructive knowledge) is of a certain status.

Accordingly, we reject appellant's vagueness challenge.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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MIHARA, J.